(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 2 8 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director) revoked the approval of the employment-based immigrant visa petition, made a finding of material misrepresentation and fraud, and invalidated the underling labor certification. The Director dismissed the subsequent motion to reopen and reconsider the decision. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software development and consulting company. It seeks to permanently employ the beneficiary in the United States as a technical director. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by a photocopy of a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).[2] The priority date of the petition is October 31, 2001.[3]

The Director approved the instant petition on December 31, 2008. Following the issuance of a two Notices of Intent to Revoke (NOIR), the Director revoked the approval of the petition on December 7, 2011.

The Notice of Revocation made the following factual determinations:

- The beneficiary founded the petitioner.
- The beneficiary is the petitioner's sole owner.
- The beneficiary has served as the petitioner's CEO.[4]
- The petitioner did not apprise the DOL of the fact that the beneficiary was an owner or officer of the company.

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States.

[2] The petitioner submitted the original approved labor certification with an earlier Form I-140 petition , which was denied by the Director on April 9, 2008.

[3] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[4] The Director's conclusion that the beneficiary had served as the company's CEO is based on the following evidence: September 14, 2007 article in the about the petitioner and the beneficiary, titled which states that the beneficiary founded the petitioner, committed himself to devoting two years to starting up the company, and, if it was not successful, he had planned to return to his full-time job; December 22, 2002 contract between the petitioner and another company, which was signed by the beneficiary using the title of CEO; and the petitioner's failure to submit Forms W-2 issued by the company the beneficiary claimed to have worked for after the establishment of the petitioner.

- On the labor certification, the petitioner certified to the DOL that "The job opportunity had been and is clearly open to any qualified U.S. worker."

The Director concluded that the concealment of the beneficiary's ownership and management of the petitioner constituted fraud and willful misrepresentation of a material fact, invalided the labor certification underlying the petition, and revoked the approval of the petition.

The petitioner filed a motion to reopen and reconsider the Director's decision on January 4, 2012. The Director dismissed the motions on December 12, 2012, stating that the regulatory requirements for the motions to reopen and reconsider had not been met.

The petitioner timely filed the instant appeal, accompanied by a brief from counsel and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[5]

Counsel's brief in support of the appeal claims that the evidence in the record was not sufficient to conclude that the beneficiary served as the CEO of the petitioner. Counsel also claims that, even if the beneficiary was CEO of the petitioner, this fact alone would not have led the DOL to conclude that he also owned the company. Counsel also claims that the petitioner did not attempt to close off any line of inquiry regarding its ownership of the petitioner because there was no obligation in the regulations to disclose the ownership of the petitioner to the DOL nor was there any place on the Form ETA 750 to provide this information. Accordingly, counsel claims that the Director's finding of fraud and material misrepresentation was in error.

The Director may revoke the approval of a petition on notice pursuant to 8 C.F.R. § 205.2. In addition, the approval of a petition is automatically revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(A) if the underlying labor certification has been invalidated.

The regulation at 20 C.F.R. § 656.30(d) (2001) provides the Director with the authority to invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification.

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining

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[5] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

an immigration benefit to which one is not entitled. *See Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.[6] The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government: 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui,* 15 I&N Dec. at 288.

In labor certification proceedings, the petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. On the Form ETA 750, Part A, Item 22, the employer certifies that the job offer "is clearly open to any qualified U.S. worker." A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

A *bona fide* job opportunity means that a true opening must exist, and is not merely the functional equivalent of self-employment. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 405 (Comm'r 1986).

In 1991 the Board of Alien Labor Certification Appeals (BALCA) applied a totality of the circumstances test to determine whether the job at issue in that application was clearly open to U.S. workers. *See In the Matter of Modular Container Systems, Inc.*, 89 INA 228 (BALCA 1991). As outlined by BALCA in that decision, the factors to consider are whether the alien:

- Is in the position to control or influence hiring decisions regarding the job for which labor certification is sought;
- Is related to the corporate directors, officers, or employees;
- Was an incorporator or founder of the company;
- Has an ownership interest in the company;
- Is involved in the management of the company;
- Is on the board of directors;

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[6] In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956).

- Is one of a small number of employees;
- Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and
- Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien.

Further, where the petitioner is owned by the beneficiary, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

> The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue." *See* 20 C.F.R. § 656.21. This "good faith search" process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms – the ban on alien self-employment and the bona fide job requirements – make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year . . .
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> The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

Bulk Farms, Inc. v. Martin, 963 F.2d at 1288.

In the instant case, the beneficiary founded the petitioner, a single member LLC, on or about September 30, 1999. The beneficiary is the sole owner of the business.[7] The labor certification states that the position offered to the beneficiary does not supervise any employees; in fact, the labor certification states that the beneficiary will be supervised by the company's chief financial officer. On the labor certification, filed on October 31, 2001, the beneficiary claimed to have been employed by the petitioner as a software engineer since June 2001. However, there is evidence in the record that that the beneficiary managed the company he founded as its CEO. Counsel claims that the evidence is not sufficient to prove that the beneficiary was the CEO, but does not unequivocally

[7] The Articles of filed with the State of New York on September 30, 1999, provide, in pertinent part, as follows: Article SIXTH: "The company is to be managed by one or more members." Article NINTH: "There are no limitations on the authority of members of the company to bind the company."

dispute that the beneficiary has served as the CEO of the company. On the labor certification, the beneficiary claims to have worked for another company, until May 2001 (almost two years after the petitioner was established), but did not submit any W-2 forms requested by the director to establish that he was in fact employed by the company after 1999. Further, this claim of prior employment is contradicted by a newspaper article about the petitioner and the beneficiary.[8] Finally, on the Form ETA 750, Part A, the petitioner certified to the DOL that "The job opportunity had been and is clearly open to any qualified U.S. worker."

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), has a nearly identical set of facts. The petitioner, a New Jersey corporation, operated as a Chinese restaurant. The petitioner obtained a labor certification approval on behalf of the beneficiary for the position of chef. The labor certification stated that the beneficiary would be supervised by the president of the company. On the labor certification, the petitioner certified that the position was open to any qualified United States worker. The petition was denied for failure to establish the ability to pay the proffered wage. On appeal, the petitioner submitted copies of its tax returns, which revealed that the beneficiary was a 50 percent owner of the company as well as its president. The Commissioner concluded that the petitioner disguised its relationship with the beneficiary, made a finding of material misrepresentation, invalidated the labor certification and dismissed the appeal. *Id.* at 402 - 403. The decision states that, when the beneficiary's association with the petitioning corporation is concealed in labor certification proceedings, the DOL is prevented from discharging its function of examining whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons. *Id.* at 404.

In the instant case, the AAO concurs with the Director's conclusion that the beneficiary has served as CEO of the petitioner. Moreover, it is undisputed that the beneficiary is the petitioner's sole owner. The Director correctly concluded that the petitioner and the beneficiary disguised the beneficiary's ownership and control of the company. Further, it is concluded that the certification on the labor certificaiton that the the job opportunity was "clearly open to any qualified U.S. worker" was not true. The concealment during the labor certification process of the beneficiary's management and ownership in the petitioning corporation constitutes the willful misrepresentation of a material fact because it shuts off a line of inquiry by the DOL that is relevant to the beneficiary's eligibility and may lead to a denial of the labor certification application. Accordingly, the Director's finding of material misrepresentation is affirmed.

In summary, the AAO concludes that the concealment of the beneficiary's ownership and management of the petitioner constituted the willful misrepresentation of material facts; that the

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[8] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Director properly invalidated the labor certification based on these material misrepresentations; and that the approval of the petition was properly revoked. Accordingly, the director's decision is affirmed and the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.